



April 5, 2002

Ms. Larissa T. Roeder
Assistant District Attorney
County of Dallas
Frank Crowley Courts Building, LB 19
Dallas, Texas 75207-4399

OR2002-1693

Dear Ms. Roeder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160854.

The Dallas County District Attorney's Office (the "district attorney") received a request for information relating to thirty-five individuals involved in a fraud investigation, specifically investigative reports prepared by International Claims Specialists. You indicate that the requestor has since limited his request to "investigative reports prepared by a company named International Claims Specialist." The requestor states that these reports "should be included in policy files containing information subpoenaed from insurance companies regarding the policies written by agents Joel Neal Ashbrook, and Jeremy Nowlin on the lives of individuals indicted and also not indicted in Dallas County."¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.112 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

¹Based on this clarified request, our ruling is limited solely to investigative reports prepared by International Claims Specialists. We do not reach whether any of the remaining information held by the District Attorney regarding fraud in the viatical settlement industry is excepted from disclosure.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

First, we address your argument that the submitted investigative reports are excepted from disclosure under section 552.112 of the Government Code. Section 552.112(a) excepts from disclosure “information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.” An entity must be a “financial institution” for its examination, operating, or condition reports to be excepted by section 552.112; it is not sufficient that the entity is regulated by an agency that regulates or supervises financial institutions. Open Records Decision No. 483 at 9 (1987). Insurance companies are not “financial institutions” for the purpose of section 552.112. *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766, 773 (Tex. App.--Austin, 1999, pet. denied). You state that the submitted investigative reports are part of 51 boxes of information generated during a joint investigation between the Texas Department of Insurance and the State Securities Board. Thus, you contend that the reports are part of a State Securities Board investigation and are therefore excepted from disclosure under section 552.112. See Open Records Decision No. 130 (1976). However, upon review of the submitted investigative reports, it does not appear that the reports relate to a “financial institution” for the purpose of section 552.112. Rather, the reports contain information about insurance policy holders and insurance companies. Therefore, the reports are not excepted from disclosure under section 552.112. See *Birnbaum*, 994 S.W.2d at 773.

You also contend that the submitted investigative reports are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(3) provides that information is excepted from public disclosure if it is information that is either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or information that reflects the mental impressions or legal reasoning of an attorney representing the state. In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney’s “entire litigation file” was “too broad” and, quoting *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding), held that “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” *Curry*, 873 S.W.2d at 380. You contend that the entire investigation file, which includes the requested investigative reports, reveals an attorney’s thought process pursuant to the opinion in *Curry*. However, as noted above, the requestor does not seek the district attorney’s entire litigation file but only certain investigative reports prepared by International Claims Specialists. Thus, the *Curry* rationale does not apply here. Because you have not otherwise demonstrated that the investigative reports at issue either were prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflect the mental impressions or legal reasoning of an attorney representing the state, we find that the reports may not be withheld under section 552.108.

Next, you contend that the investigative reports are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The district attorney has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district attorney must meet both prongs of this test for information to be excepted under 552.103(a).

You state that investigations and litigation relating to the joint investigation into viatical settlement fraud are pending. Specifically, you state that "[a]gents with the federal postal inspectors office informed [you] that their investigation is still pending and that individuals identified in the office's investigation and the State Securities Board Investigation are currently being prosecuted in federal court." You also indicate that the Department of Justice continues to investigate viatical settlement fraud. However, section 552.103 applies only to litigation to which the governmental body claiming the exception is a party. Open Records Decision No. 392 at 3 (1983). You indicate that at the time of the request the district attorney was still involved in an appeal of an individual's conviction for securing execution of documents by deception and money laundering. You have submitted to this office the original indictment, the district attorney's brief from the appeal, as well as the subsequent ruling by the appellate court. Based on our review of the documents, we understand that the defendant in the case participated in a scheme to defraud life insurance companies by assisting terminally ill individuals in falsifying insurance applications for the purpose of obtaining life insurance. While you generally indicate that the requested reports relate to the nationwide viatical settlement fraud investigation in which the district attorney participated, you do not specifically indicate, nor is it apparent, how the requested reports relate to the issues in the criminal appeal involving the district attorney. See Open Records Decision No. 551 at 5 (1990). Consequently, we find that you have not adequately demonstrated that the requested information relates to pending or reasonably anticipated litigation

involving the district attorney and, therefore, the information may not be withheld under section 552.103 of the Government Code.

Nevertheless, you contend that the requested reports are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure].” This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See id.*; Open Records Decision No. 615 at 5 (1993). You do not demonstrate how the requested investigative reports produced by International Claims Specialists constitute interagency or intra-agency communications. Thus, you may not withhold the investigative reports under section 552.111 and the deliberative process privilege.

Next, you argue that some of the requested information is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

The submitted investigative reports do not contain any motor vehicle or personal identification information protected under this provision.

Finally, you contend that the requested investigative reports are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” First, you contend that the requested information is confidential under article 20.02 of the Texas Code of Criminal Procedure. Article 20.02(a) of the Code of Criminal Procedure provides that “[t]he proceedings of the grand jury shall be secret.” You do not indicate, nor is it apparent, how release of the requested investigative reports would reveal the proceedings of a grand jury. Thus, we find that the reports are not confidential under article 20.02 of the Code of Criminal Procedure.

You argue that social security numbers contained in the requested information are confidential under the federal Social Security Act. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). However, the submitted investigative reports do not contain social security numbers. Thus, none of the requested information is confidential under 42 U.S.C. § 405(c)(2)(C)(viii)(I).

Likewise, you contend that criminal history record information is confidential under chapter 411 of the Government Code. Criminal history record information obtained from the Texas Department of Public Safety or any other criminal justice agency is confidential under Government Code chapter 411, subchapter F. However, the submitted reports do not consist of criminal history record information. *See* Gov't Code § 411.082(3). Thus, the reports are not confidential under chapter 411, subchapter F of the Government Code.

You argue that some of the requested information is confidential under section 559.001, 559.002, and 559.003 of the Government Code. These provisions of the Government Code provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The requested investigative reports do not contain any biometric identifiers for the purpose of sections 559.002 and 559.003 of the Government Code.

You also contend that the requested information is confidential under the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released

only as provided under the MPA. Open Records Decision No. 598 (1991). Although the requestor specifically excluded medical records attached to the investigative reports from his request, we find that some of the information in the submitted investigative report consists of information obtained from medical records. This information, which we have marked, may be released only in accordance with the MPA.

Next, you argue that some of the requested information is confidential under constitutional and common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has determined that some personal financial information is highly intimate or embarrassing for the purpose of common-law privacy. Open Records Decision Nos. 545 (1990) (common-law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information). In this instance, we find that the insurance policy numbers contained in the submitted investigative reports constitute intimate information for the purpose of common-law privacy, and the public has no legitimate interest in those numbers. Accordingly, we agree that you may withhold the insurance policy numbers contained in the requested reports under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, you must withhold, in accordance with the MPA, the marked information in the submitted investigative reports that was obtained from medical records. You must withhold the insurance policy numbers contained in the investigative reports under section 552.101 of the Government Code and common-law privacy. However, you must release the remainder of the submitted investigative reports prepared by International Claims Specialists.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

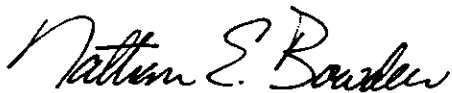
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 160854

Enc: Submitted documents

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